

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## BANK OF NEW YORK MELLON,

Case No.: 2:18-cv-00161-APG-NJK

## Plaintiff

## **Order Granting Motions for Summary Judgment**

V.

[ECF Nos. 33, 37]

WILLISTON INVESTMENT GROUP LLC,  
et al.,

## Defendants

10 Plaintiff The Bank of New York Mellon (BONY) sues to determine whether a non-  
11 judicial foreclosure sale conducted by defendant The Parks Homeowners Association (Parks)  
12 extinguished BONY's deed of trust that encumbered property located at 6770 Cinnabar Coast  
13 Lane in North Las Vegas, Nevada. Parks purchased the property via credit bid at the  
14 homeowners association (HOA) foreclosure sale. Parks then transferred the property to  
15 defendant Williston Investment Group LLC (Williston), which is the current property owner.

16 BONY asserts a single claim for declaratory relief, seeking a declaration that the deed of  
17 trust remains an encumbrance on the property. ECF No. 1. Williston counterclaims for  
18 declaratory relief that it took title to the property free and clear of the deed of trust. ECF No. 25.

19 Williston moves for summary judgment, arguing that BONY's claim is untimely, there is  
20 no basis to equitably set aside the sale, the relevant statutes do not violate BONY's due process  
21 rights, the sale is presumed valid, and Williston is a bona fide purchaser. BONY responds that  
22 its complaint is timely or, alternatively, that Williston is not entitled to judgment on its  
23 counterclaim because the HOA sale was for a subpriority lien only. BONY asserts that its

1 servicer tendered the superpriority amount before the HOA sale, thereby extinguishing the  
2 superpriority lien.

3 BONY separately moves for summary judgment on Williston's counterclaim, arguing  
4 that the tender extinguished the superpriority lien and that Williston is not a bona fide purchaser.  
5 Williston responds that BONY has offered only hearsay evidence to establish the superpriority  
6 amount. Williston also argues that BONY has not presented evidence that the tender was  
7 actually delivered to the HOA foreclosure agent, and even if delivered, the tender attempt  
8 contained an impermissible condition because it required the HOA to waive its continuing right  
9 to nuisance abatement charges as part of the superpriority lien. Williston also reiterates its  
10 arguments from its own motion that the sale is presumed valid and it is a bona fide purchaser.

11 BONY replies that it has presented admissible business records to show the superpriority  
12 amount, that there were no nuisance abatement charges, and that its servicer tendered the  
13 superpriority amount. BONY also argues that because the tender extinguishes the superpriority  
14 lien as a matter of law, Williston's alleged status as a bona fide purchaser is irrelevant.

15 The parties are familiar with the facts, and I will not repeat them here except where  
16 necessary to resolve the motions. I grant Williston's motion for summary judgment on BONY's  
17 claim because that claim is untimely. I grant BONY's motion on Williston's counterclaim  
18 because Williston has not shown it is entitled to a quiet title judgment in its favor where BONY's  
19 servicer tendered the superpriority amount.

20 **I. LEGAL STANDARD**

21 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to  
22 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
23 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence  
2 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

3 The party seeking summary judgment bears the initial burden of informing the court of  
4 the basis for its motion and identifying those portions of the record that demonstrate the absence  
5 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
6 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
7 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
8 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
9 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
10 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
11 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
12 F.3d 915, 920 (9th Cir. 2008).

13 **II. WILLISTON’S MOTION FOR SUMMARY JUDGMENT**

14 Williston moves for summary judgment on BONY’s quiet title claim, asserting it is  
15 untimely. The HOA foreclosure sale took place on February 1, 2013, the trustee’s deed upon  
16 sale was recorded on February 7, 2013, and BONY filed the complaint in this matter on January  
17 29, 2018. ECF Nos. 1; 33-6. I have previously ruled that “the catchall four-year limitation period  
18 in § 11.220 applies” to claims by lienholders like BONY seeking to determine whether the deed  
19 of trust survived an HOA foreclosure sale. *Bank of Am., N.A. v. Country Garden Owners Ass’n*,  
20 No. 2:17-cv-01850-APG-CWH, 2018 WL 1336721, at \*2 (D. Nev. Mar. 14, 2018). BONY’s  
21 declaratory relief claim was filed more than four years after BONY knew or should have known  
22 that its deed of trust was in jeopardy. *See Job’s Peak Ranch Cnty. Ass’n, Inc. v. Douglas Cty.*,  
23 No. 55572, 2015 WL 5056232, at \*3 (Nev. Aug. 25, 2015) (“If the facts giving rise to the cause

1 of action are matters of public record then the public record gave notice sufficient to start the  
2 statute of limitations running.” (quotation and alteration omitted)). I therefore grant Williston’s  
3 motion because BONY’s claim is time-barred.

4 **III. BONY’s MOTION FOR SUMMARY JUDGMENT**

5 BONY moves for summary judgment on Williston’s counterclaim to quiet title. The  
6 party asserting a quiet title claim bears the burden of proof “to prove good title in himself.” *Res.*  
7 *Grp., LLC as Tr. of E. Sunset Rd. Tr. v. Nevada Ass’n Servs., Inc.*, 437 P.3d 154, 157-58 (Nev.  
8 2019) (en banc) (quotation omitted). Thus, “a plaintiff’s right to relief [ultimately] . . . depends  
9 on superiority of title.” *Id.* (quotation omitted). A quiet title claim “does not require any  
10 particular elements.” *Id.* Rather, “each party must plead and prove his or her own claim to the  
11 property in question.” *Chapman v. Deutsche Bank Natl Tr. Co.*, 302 P.3d 1103, 1106 (Nev.  
12 2013) (en banc) (quotation omitted).

13 Although Williston bears the burden of proving good title in itself on its counterclaim,  
14 tender is an affirmative defense that BONY bears the burden of proving. *Res. Grp., LLC as Tr. of*  
15 *E. Sunset Rd. Tr.*, 437 P.3d at 158 (“Payment of a debt is an affirmative defense, which the party  
16 asserting has the burden of proving.”). “A valid tender of payment operates to discharge a lien  
17 or cure a default.” *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 117 (Nev.  
18 2018) (en banc) (quotation omitted). For tender to be valid, it must be (1) “payment in full” and  
19 (2) either unconditional or “with conditions on which the tendering party has a right to insist.” *Id.*  
20 at 118. “The only legal conditions which may be attached to a valid tender are either a receipt  
21 for full payment or a surrender of the obligation.” *Id.* (quotation omitted).

22 BONY’s evidence of tender is an affidavit from Douglas Miles, a managing partner of  
23 the law firm Miles, Bergstrom & Winters, LLP, formerly known as Miles, Bauer, Bergstrom &

1 Winters, LLP (Miles Bauer). ECF No. 34-1 at 19. Miles avers that Bank of America, N.A.  
2 retained Miles Bauer to tender payments to HOAs to satisfy superpriority liens, including the  
3 lien on the property at issue in this case. *Id.*

4 In July 2012, Miles Bauer wrote a letter to the HOA's foreclosure agent, Fuller Jenkins,  
5 requesting the payoff amount for the superpriority lien. ECF No. 34-1 at 26. In response, Fuller  
6 Jenkins sent a ledger for the property. *Id.* at 21, 29-33. That ledger showed that assessments  
7 prior to the April 2012 notice of delinquent assessments were \$74 per month. *Id.* The ledger  
8 does not show any nuisance abatement charges. *Id.* On October 26, 2012, Miles Bauer sent to  
9 Fuller Jenkins a check in the amount of \$1,237.90. *Id.* at 33-35. The accompanying letter stated  
10 that this was "a non-negotiable amount and any endorsement of said cashier's check on your  
11 part, whether express or implied, will be strictly construed as an unconditional acceptance on  
12 your part of the facts stated herein and express agreement that [Bank of America's] financial  
13 obligations towards the HOA in regards to the [property] have now been 'paid in full.'" *Id.* at 34.  
14 According to Miles Bauer's records, the check was returned on November 8, 2012. *Id.* at 24.

15 Williston contends I should not consider these records because they are hearsay and do  
16 not fall within the business records exception in Federal Rule of Evidence 803(6). Under Rule  
17 803(6), a record of a regularly conducted activity is not excluded by the hearsay rule if the record  
18 meets the following requirements:

19 (A) the record was made at or near the time by--or from information transmitted  
20 by--someone with knowledge;  
21 (B) the record was kept in the course of a regularly conducted activity of a  
business, organization, occupation, or calling, whether or not for profit;  
22 (C) making the record was a regular practice of that activity;  
23 (D) all these conditions are shown by the testimony of the custodian or another  
qualified witness, or by a certification that complies with Rule 902(11) or (12) or  
with a statute permitting certification; and  
(E) the opponent does not show that the source of information or the method or  
circumstances of preparation indicate a lack of trustworthiness.

1 Miles avers that the Miles Bauer records meet each of these requirements. ECF No. 34-1 at 19.

2 Williston has not presented evidence raising a genuine dispute on any of these factors.

3 Nor has Williston presented evidence to suggest that Fuller Jenkins did not receive the tender.<sup>1</sup>

4 Williston “must do more than simply show that there is some metaphysical doubt as to the  
5 material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It  
6 has not done so here. BONY has presented uncontradicted evidence that Miles Bauer tendered  
7 more than the superpriority amount, including evidence that there were no nuisance abatement  
8 charges.

9 Williston contends, however, that the tender was invalid because it attached an improper  
10 condition. The Supreme Court of Nevada has rejected this argument based on identical  
11 conditional language. *See Bank of Am., N.A.*, 427 P.3d at 118.

12 Finally, Williston argues it is a bona fide purchaser. However, a “party’s status as a BFP  
13 is irrelevant when a defect in the foreclosure proceeding renders the sale void.” *Id.* at 121.  
14 “[A]fter a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the  
15 entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of  
16 trust on the property.” *Id.* Williston cannot prevail on its quiet title counterclaim. I therefore  
17 grant BONY’s motion for summary judgment.

18 **IV. CONCLUSION**

19 IT IS THEREFORE ORDERED that defendant Williston Investment Group LLC’s  
20 motion for summary judgment (**ECF No. 33**) is **GRANTED**. The clerk of court is instructed to  
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23 <sup>1</sup> Nevada law creates a rebuttable presumption that “a letter duly directed and mailed was received in the regular course of the mail.” Nev. Rev. Stat. § 47.250(13).

1 enter judgment on plaintiff Bank of New York Mellon's complaint in favor of defendant  
2 Williston Investment Group LLC and against plaintiff Bank of New York Mellon.

3 IT IS FURTHER ORDERED that counterdefendant Bank of New York Mellon's motion  
4 for summary judgment (**ECF No. 37**) is **GRANTED**. The clerk of court is instructed to enter  
5 judgment on counterclaimant Williston Investment Group LLC's counterclaim in favor of  
6 counterdefendant Bank of New York Mellon and against counterclaimant Williston Investment  
7 Group LLC.

8 DATED this 16th day of May, 2019.



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10 ANDREW P. GORDON  
11 UNITED STATES DISTRICT JUDGE  
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